Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OMAR MONTES,

Petitioner

v.

THE CITY OF HOUSTON

On Petition For Writ of Certiorari
To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Texas Supreme Court let stand two opposite intermediate appeals court decisions involving the identical legal issue arising from the exact same occurrence. The result is that of the four occupants in a one-car accident, three can sue but one cannot. This raises the following question presented for review:

Whether the Texas Supreme Court has denied Petitioner equal protection of the laws in its disparate treatment of Petitioner and others in their respective lawsuits concerning the identical cause of action, and the identical legal issue, arising from the same one-car collision.

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In the Supreme Court of the United States

OMAR MONTES, *Petitioner*

v.

THE CITY OF HOUSTON

On Petition For Writ of Certiorari
To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

Omar Montes respectfully petitions for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINION BELOW

The concurring opinion of Justices Hecht and Owen of the Texas Supreme Court (App., infra, 1A–5A) is reported at *Montes v. City of Houston*, 66 S.W.3d 267 (Tex. 2001) (denying review of *Montes v. City of Houston*, 2000 WL 1228618 (Tex. App. - Houston [14th Dist.] Aug. 31, 2000)(No. 14-99-00174-CV)(App. 6A–12A), opinion supplemented on denial of rehearing by *Montes v. City of Houston*, 2000 WL 1562355 (Tex. App. - Houston [14th Dist.] Oct. 19, 2000)(No. 14-99-00174-CV)(App. 13A–14A)).

JURISDICTION

The judgment of the Texas Supreme Court denying review was entered on October 18, 2001. Rehearing was denied on February 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. Justices Hecht and Owen of the Texas Supreme Court succinctly stated the facts of this case in their concurring opinion:

> "The Fourteenth Court of Appeals decided this case differently than the First Court of Appeals decided another case involving not only the identical legal issue *but the exact same occurrence*. The result is that of the four passengers in a one-car accident, three can sue, and one cannot, based on differing applications of the very same law." (App., 1A – 2A)(Emphasis in original).

> "Gilberto Rios was driving back from a wedding with three friends, Edward Leal, Roberto Cortez, and Omar Montes, when they became lost, mistakenly sped

down a dead-end road, and ran off the end, colliding with a fence and dirt pile. Rios, Leal, and Cortez died in the accident, and their beneficiaries sued the City of Houston for wrongful death in the 270th District Court in Harris County, asserting that the City should have erected a barricade at the end of the street to prevent such accidents. Montes survived and later brought his own suit against the City based on the same allegations but in the 333rd District Court of Harris County. The City filed a plea to the jurisdiction in the wrongful death suit, *Reyes*, which the trial court sustained, and the plaintiffs appealed. While that appeal was pending, the City filed a plea to the jurisdiction in *Montes*, which that trial court also sustained, and the plaintiff appealed. In *Reyes*, the First Court of Appeals reversed and remanded[.] The City petitioned this Court for review, and after requesting full briefing, we denied the petition on August 31, 2000. ... That same day a divided Fourteenth Court of Appeals affirmed the dismissal in favor of the City in *Montes*[.] ... Montes petitioned this Court for review, and we again requested full briefing. Today we deny Montes's petition. ...The two courts of appeals' decisions in *Reyes* and *Montes* cannot both be right, obviously." (App., 2A - 4A).

2. The Texas Supreme Court's denial of review in this case was entered on October 18, 2001. Petitioner filed a Motion for Rehearing in the Texas Supreme Court on November 7, 2001. In the Motion for Rehearing, the issue was raised that the Court's actions in denying review in both related cases had resulted in the denial to Petitioner of equal protection of the laws, as guaranteed to Petitioner by Amendment XIV of the U.S. Constitution. Petitioner's motion for Rehearing was denied without opinion on February 14, 2002.

ARGUMENT

1. The judicial treatment of Petitioner's claim constitutes a denial of his equal protection rights guaranteed by Amendment XIV of the United States Constitution. The families of the three young men killed in this one-car collision are able to pursue their lawsuit against the City, but Petitioner is barred from pursuing his claim against the City. This case presents a conflict between two courts of appeal that have reached opposite legal results applying the identical legal issue of sovereign immunity to the identical one-car collision. The issues arising from one car wreck cannot be fairly and equally adjudicated by two exactly opposite legal principles. By denying review of both cases, thereby allowing the opposite results to stand, the Texas Supreme Court has denied Petitioner substantive due process by denying his right to equal protection of the laws.

2. If all free men have the equal rights promised by the U.S. Constitution, Petitioner is no longer a free man. The Texas Supreme Court has told the survivors of the three decedents that they may maintain their lawsuit, while denying the exact same right to Petitioner. The law of equal protection is categorized and classified by phrases such as fundamental rights, inherently suspect classes, classifications rationally related to judicial interests, similarly situated persons, burdens upon one class which are not imposed on all classes, strict scrutiny, compelling state interests, rational relation tests, etc. Applying any test ever created by any appellate court in this country for the purpose of analyzing equal protection of the laws, Petitioner can discern no valid basis for the Texas judicial system to allow opposite appellate rulings in the exact same automobile collision to result in opposite treatment of litigants that are identically situated.

3. This Court has defined the principle of equal protection of the laws as follows:

> "The fourteenth amendment...undoubtedly intended...that equal protection and security should be

> given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have *like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs*, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances...[.]"

Barbier v. Connolly, 113 U.S. 27, 31; 5 S.Ct. 357, 359 (1884). (Emphasis added). When the three decedents in the collision are allowed to maintain suit and try their case in court, while Petitioner is denied the same allowance, the principles stated above by this Court are violated. No state interest is advanced by treating Petitioner differently in this case. Petitioner's plight is aptly described by Justices Hecht and Owen's observation of "the unfairness to litigants in having the law depend on what court they happen to be in[.]" (App., 1a). The state of the law in Texas in this case is constitutionally intolerable.

4. As long as there are intermediate appellate courts in the federal and state judicial systems, there will be conflicts and splits of authority between those courts. Those conflicts are not an improper denial of equal protection of the law. Different cases, dealing with different facts, will inevitably produce different interpretations of the same laws. Those conflicts are not at issue here. This case is completely different and unique. Four boys were involved in a one-car collision. Three boys died, one boy lived. Now, as a result of Texas judicial rulings, one lawsuit involving the families of two passengers and the driver is not barred by sovereign immunity, while one passenger in his separate suit has been told that his lawsuit is barred by sovereign immunity. The Texas Supreme Court allowed both diametrically opposed intermediate court rulings to stand without addressing the

equal protection aspects of this case. Under any definition of equal protection or notion of fundamental fairness, one event cannot produce two exactly opposite interpretations of the same law. A court system that allows opposite legal results to arise from one event writes a recipe for the denial of equal protection.

5. The fallacy of a position can frequently be revealed by an analysis of its consequences. As the law is currently being applied in Texas, Petitioner is barred from any possibility of recovery for his injuries. Each of the following scenarios involving the other occupants of the same car is possible, plausible, or probable. Any one of the following outcomes would illustrate the unfair practical effect of the denial of equal protection to Petitioner:

a. The *Reyes* plaintiffs can settle their case with the City before trial;

b. The *Reyes* plaintiffs could win their trial, and collect their judgment;

c. The *Reyes* plaintiffs could win their lawsuit in the trial court, and settle while the case is pending on appeal;

d. The *Reyes* plaintiffs could win their lawsuit in the trial court, win any appeal in the Court of Appeals, and collect their judgment;

e. The *Reyes* plaintiffs could win their lawsuit in the trial court, win any appeal in the Court of Appeals, and settle while the case is pending in the Texas Supreme Court;

f. The *Reyes* plaintiffs could get their day in court, try their lawsuit and lose at trial; or

g. The *Reyes* plaintiffs could get their day in court, win, and then lose at the appellate level.

Petitioner is currently denied all of these options despite having been in the same collision, having filed a lawsuit in the same county in a district court with identical jurisdiction to the *Reyes* district court, appealing to a court of appeals with

identical jurisdiction to the *Reyes* appellate court, and appealing to the same Texas Supreme Court. By allowing the *Reyes* plaintiffs to proceed with their case in the trial court, while denying Petitioner the same allowance, the Texas Supreme Court has made a mockery of equal protection as applied to Petitioner, and each of the realistic *Reyes* scenarios proves the injustice.

6. Petitioner disagrees with the analysis of sovereign immunity contained in the opinions written in this case, but does not believe this Court has any interest in state court application of state law. However, this Court is the final interpreter of the United States Constitution, and review is sought solely on constitutional grounds.

CONCLUSION

The inscription on the pediment of the United States Supreme Court proudly proclaims a fundamental truth upon which this nation was founded and has endured for over two centuries:

"Equal Justice Under Law."

Petitioner has been denied the promise of this fundamental right by the judicial system of the State of Texas.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TEXAS

No. 00-1201

OMAR MONTES, PETITIONER
v.
THE CITY OF HOUSTON, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Review Denied.

JUSTICE HECHT, joined by JUSTICE OWEN, concurring in the denial of the petition for review.

To one of its oldest and most beneficent functions – resolving conflicts of law among the courts of appeals – this Court has an inexplicably mulish aversion, preferring instead the resulting confusion in the law, the unfairness to litigants in having the law depend on what court they happen to be in, and the waste of time and money, public and private, in pointless litigation over issues that could readily be resolved. I have noted this aversion and its consequences,[1] and so has the appellate bar,[2] but this case displays the problem yet more

[1] *Wagner & Brown, Ltd. v. Horwood*, __ S.W.3d __, __ (Tex. 2001) (Hecht, J., dissenting); *Coastal Corp. v. Garza*, 979 S.W.2d 318, 323 (Tex. 1998) (Hecht, J., dissenting).

[2] *Wagner & Brown*, __ S.W.3d at __ n.15., __ n.17 (Hecht, J., dissenting) (citing and quoting commentaries).

vividly. The Fourteenth Court of Appeals decided this case differently than the First Court of Appeals decided another case involving not only the identical legal issue *but the exact same occurrence*. The result is that of the four passengers in a one-car accident, three can sue and one cannot, based on differing applications of the very same law. This Court could resolve this very uncomfortable conflict in a few sentences but refuses to do so. I think the Fourteenth Court of Appeals was correct in this case and therefore concur in the denial of the petition for review. Probably the Court does too, or it would not deny the petition, but it should explain why to give guidance in the other case that has been remanded to the trial court to spare the participants a water haul.

Gilberto Rios was driving back from a wedding with three friends, Edward Leal, Roberto Cortez, and Omar Montes, when they became lost, mistakenly sped down a dead-end road, and ran off the end, colliding with a fence and dirt pile. Rios, Leal, and Cortez died in the accident, and their beneficiaries sued the City of Houston for wrongful death in the 270th District Court in Harris County, asserting that the City should have erected a barricade at the end of the street to prevent such accidents.[3] Montes survived and later brought his own suit against the City based on the same allegations but in the 333rd District Court of Harris County.[4] The City filed a plea to the jurisdiction in the wrongful death suit, *Reyes*, which the trial court sustained, and the plaintiffs appealed. While that appeal was pending, the City filed a plea to the jurisdiction in *Montes*, which that trial court also sustained, and the plaintiff appealed. In *Reyes*, the First Court of Appeals reversed and remanded, holding that "immunity for

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[3] *Catalina Cortez Reyes, et al. v. City of Houston*, No. 96-40999 (270th Dist. Ct., filed Aug. 15, 1996).

[4] *Omar Montes v. City of Houston*, No. 98-05537 (333rd Dist. Ct., Harris County, Tex., filed Feb. 4, 1998).

discretionary acts under [section 101.056 of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.056] 'does not apply to claims arising from the absence of a warning device if the government knew of the problem and failed to act within a reasonable time,' as required by [section 101.060 of the Act, TEX. CIV. PRAC. & REM. CODE § 101.060]."[5] The City petitioned this Court for review, and after requesting full briefing, we denied the petition on August 31, 2000.[6] I noted my dissent.[7] That same day a divided Fourteenth Court of Appeals affirmed the dismissal in favor of the City in *Montes*, holding that under section 101.056, the City was immune from liability for failing to barricade the end of the dead-end road, notwithstanding section 101.060.[8] Acknowledging the different result in *Reyes*, the majority explained that the plaintiffs in that case did not complain of a poorly lit dead-end sign as Montes did.[9] But as the dissent argued, the

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[5] *Reyes v. City of Houston*, 4 S.W.3d 459, 462 (Tex. App.- Houston [1st Dist.] 1999, pet. denied) (quoting *Harris County v. Demny*, 886 S.W.2d 330, 336 n.1 (Tex. App.- Houston [1st Dist.] 1994, writ denied), and citing *Zambory v. City of Dallas*, 838 S.W.2d 580, 583 (Tex. App.- Dallas 1992, writ denied)).

[6] *City of Houston v. Reyes*, No. 99-1273, 43 Tex. Sup. Ct. J. 1184 (pet. denied Aug. 31, 2000).

[7] *Id.*

[8] *Montes v. City of Houston*, 2000 WL 1228618, 2000 Tex. App. LEXIS 5827, 7077, http://www.14thcoa.courts.state.tx.us/Opinions/083100/opinions.html (Tex. App.- Houston [14th Dist.] 2000, pet. denied) (unpublished opinion) (citing *State v. Miguel*, 2 S.W.3d 249, 251 (Tex. 1999) (per curiam), in turn citing *Maxwell v. Texas Dep't of Transp.*, 880 S.W.2d 461, 464 (Tex. App.- Austin 1994, writ denied)).

[9] *Montes*, 2000 WL 1228618 at *4 n.3, 2000 Tex. App. LEXIS 5827 at *10 n.3, http://www.14thcoa.courts.state.tx.us/Opinions/083100/opinions.html at 6, n.3.

insignificance of this distinction seems inescapable.[10] Montes petitioned this Court for review, and we again requested full briefing. Today we deny Montes's petition.

The two courts of appeals' decisions in *Reyes* and *Montes* cannot both be right, obviously. If the *Reyes* decision were right, I doubt the Court would deny Montes's petition for review and leave him without the redress available to the three other boys in his car. But if the *Montes* decision is right, as I think it is, then every dollar and every hour the plaintiffs, the City, and the district court spend litigating *Reyes* will simply be wasted. The Court could easily spare a few words to prevent this wasted effort, having cut the number of opinions it issues nearly in half over the past eight years (from 163 in 1992-1993 to 88 in 2000-2001). One court of appeals is right, and refusing to say which is simply an injustice. For those who argue that silence is justified because this Court's functions do not include correction of error, whatever the cost, I would point out that the immunity issue in *Reyes* and *Montes* is a recurring one of importance to the jurisprudence.[11]

Facing the Court's inscrutable recalcitrance to provide guidance when most needed, litigants must feel like Alice asking directions of the Cheshire Cat.

> "That depends a good deal on where you want to go," said the Cat.
>
> "I don't much care where —" said Alice.
>
> "Then it doesn't matter which way you go,"

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[10] *Montes*, 2000 WL 1228618 at *1, 2000 Tex. App. LEXIS 5827 at *11, http://www.14thcoa.courts.state.tx.us/Opinions/083100/opinions.html at 7 (Amidei, J., dissenting).

[11] *See, e.g., Texas Dept. of Transp. v. Bederka*, 36 S.W.3d 266 (Tex. App.- Beaumont 2001, no pet.) (holding that the government is immune from liability for its choice of traffic protection devices); *City of Midland v. Sullivan*, 33 S.W.3d 1 (Tex. App.- El Paso 2000, pet. dism'd w.o.j.) (holding that an improper traffic control device may create a dangerous condition for which the government's immunity from liability is waived).

said the Cat.

"– so long as I get *somewhere*," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."[12]

Grinning, the Cat slowly vanished.

Nathan L. Hecht
Justice

Opinion delivered: October 18, 2001

[12] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 51, 53 (W.W. Norton & Co. 1971).

2000 WL 1228618 (Tex. App. - Houston [14th Dist.])

NOTICE: NOT DESIGNATED FOR PUBLICATION UNDER T.R.A.P. 47.7

Court of Appeals of Texas, Houston (14th Dist.)
Omar MONTES, Appellant,
v.
The CITY OF HOUSTON, Appellee.
No. 14-99-00174-CV.
August 31, 2000.

On Appeal from the 333rd District Court, Harris County, Texas, Trial Court Cause No. 98-05537.

Panel consists of Justices AMIDEI, ANDERSON, and FROST.

DISSENTING OPINION

AMIDEI, J.

I respectfully dissent.

I disagree with the majority's analysis of the "poorly lit" dead end sign with the conclusion it provides immunity to the City. Appellant does not argue that this sign, which did not warn of the dangerous excavation and pile of dirt beyond the end of the street, was the wrong type of warning device, i.e. a barricade and/or warning lights should have been used instead of a dead end sign.

Appellant claims that Tex.Civ.Prac. & Rem.C. Ann. (Vernon 1997) §101.060(a)(2) operates to waive the City's sovereign immunity because where the City had notice of the absence of a barricade and/or warning lights at a dangerous site, and failed to correct it within a reasonable time, immunity for discretionary acts of a governmental entity does not apply. *Reyes v. City of Houston*, 4 S.W.3d 459, 462 (Tex.App.- Houston [1st Dist.] 1999, pet. filed). *Harris County v. Demny*, 886 S.W.2d

330 (Tex.App.–Houston [1st Dist.] 1994, writ denied); *Zambory v. City of Dallas*, 838 S.W.2d 580, 583 (Tex.App.– Dallas 1992, writ denied). In *Reyes*, a companion case, it was held the City waived immunity for failing to correct the same dangerous condition made the basis of this case. The majority tries to distinguish *Reyes* by stating there was no mention of the dead end sign in the opinion. There was no reason for the Court of Appeals to mention the dead end sign because it was not relevant to the decision. It is not relevant here either.

I would hold that the City did waive its sovereign immunity and reverse the trial court's dismissal of the case.

MAJORITY OPINION

FROST, J.

This is an appeal from an order granting the City of Houston's plea to the jurisdiction. The sole issue raised on appeal is whether sovereign immunity protects the City from liability.

FACTUAL BACKGROUND

The underlying litigation arises from a single automobile accident occurring shortly before midnight on July 13, 1996, at 699 West 6th Street, in Houston, Texas. Four young men, including the appellant, Omar Montes, became lost while returning from a wedding. As they were driving, the street suddenly ended. Their car left the road and traveled thirty-one feet from the end of the road before striking a large pile of dirt. Of the four men in the vehicle, only Montes survived the crash. According to the police report, speeding and alcohol contributed to the accident.

Over a month before the Montes accident, Wenny Susanto was driving her car on the same street (West 6th Street) at approximately 9:30 p.m. Like the car in which Montes and his companions were traveling, Susanto's car also crashed into the pile of dirt at the end of the road. Susanto reported her accident to Officer Steve Liddle of the Houston Police Department on June 2, 1996, the day after it occurred. In addition to driver inattention, Officer Liddle cited a lack of

barricades as a possible contributing factor in the Susanto accident.

PROCEDURAL BACKGROUND

Montes originally filed suit under the Texas Tort Claims Act on February 4, 1998, and subsequently filed an amended petition on January 8, 1999. Montes claims the failure of the City to place a barricade or warning lights at the dead end of West 6th Street exposes the City to liability. According to Montes, the notice provided by Susanto gave rise to a duty to correct the hazardous condition within a reasonable time. While Montes acknowledges the existence of a warning sign on the road just before the dead end, he claims the sign was poorly lit. Moreover, Montes claims that due to the lack of barricades, the lights create an optical illusion that the road continues beyond the dead end.

The City filed a plea to the jurisdiction on November 4, 1998, claiming the trial court lacked subject matter jurisdiction because Montes could not show a waiver of sovereign immunity. According to the City, the decision to place a barricade or other warning device is discretionary as a matter of law, thereby providing the City with immunity. The trial court granted the City's plea to the jurisdiction.

STANDARD OF REVIEW

Whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo*. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of the action. See *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)(per curiam). The plaintiff bears the burden of alleging facts affirmatively demonstrating the lack of governmental immunity and therefore, the trial court has subject matter jurisdiction. See *Reyes v. City of Houston*, 4 S.W.3d 459, 461 (Tex.App.- Houston [1st Dist.] 1999, pet. filed). When deciding whether to grant a plea to the jurisdiction, the trial court must look solely to the allegations in the plaintiff's

petition. See *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex.App.– Austin 1994, writ denied). The court of appeals must take those allegations as true and construe them in favor of the plaintiff unless the defendant pleads and proves the allegations in the petition were fraudulently made. See *Michael v. Travis County Housing Authority*, 995 S.W.2d 909, 911 (Tex.App.– Austin 1999, no pet.).

SOVEREIGN IMMUNITY

Generally, a municipality in Texas is immune from tort liability under the doctrine of sovereign immunity. See *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998)(en banc). However, the Texas Tort Claims Act ("TTCA") waives immunity in certain circumstances. See Tex.Civ.Prac. & Rem. Code Ann. §101.025(a) (Vernon 1997). Before determining if the TTCA waives a municipality's immunity, we must decide whether: (1) the complained of actions are proprietary or governmental, (2) the actions were discretionary, and (3) the plaintiff's claims are of the type that subject the City to liability. See *City of Fort Worth v. Gay*, 977 S.W.2d 814, 816 (Tex.App.– Fort Worth 1998, no pet.).

Characterization of Actions as Proprietary or Governmental Functions

First, we consider whether the actions about which Montes complains are proprietary or governmental. Proprietary functions are those that a municipality, in its discretion, may perform in the interests of the inhabitants of the municipality. See Tex.Civ.Prac. & Rem. Code Ann. §101.0215(b) (Vernon Supp. 2000). The TTCA does not apply to the liability of a municipality for damages arising from its proprietary functions. See *id.* Governmental functions are those enjoined on a municipality by law and are given to it "by the state as part of the state's sovereignty, to be exercised in the interest of the general public." Tex.Civ.Prac. & Rem. Code Ann. §101.0215(a) (Vernon Supp. 2000). A municipality is liable under the TTCA for governmental functions, including warning signals, regulation of traffic, and the maintenance

relating to traffic signals, signs, and hazards. See *id.* Therefore, the function at issue in this case is governmental in nature.[1]

Next, we must address whether this governmental function is discretionary. Discretionary acts are those that the governmental unit is not required to perform by law; the TTCA does not apply to discretionary acts. See Tex.Civ.Prac. & Rem. Code Ann. §101.056 (Vernon 1997). The placement of warning signs is generally a discretionary act because placement is in the discretion of the traffic engineers. See *State v. Rodriguez*, 985 S.W.2d 83, 86 (Tex. 1999) (per curiam). Montes did not assert that the placement of a barricade is a mandatory duty. Therefore, with no allegations to the contrary, we must find that the placement of warning signs is a discretionary act.

Even though the placement of warning signs is a discretionary act, and so the TTCA would not normally apply, the TTCA can still apply when the complaint is about "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device" and the municipality has notice of and a reasonable time to correct the problem. Tex.Civ.Prac. & Rem. Code Ann. §101.060(a)(2) (Vernon 1997). Here, there were no barricades at the dead end on West 6th Street. Montes pled that before his accident, the City had notice of the absence of a barricade.[2] At first glance, Montes appears to be

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[1] Montes claims this analysis has no applicability to claims under section 101.060 of the Texas Civil Practice and Remedies Code, a subsection of the TTCA. Logic dictates that before we can find that a municipality exposed itself to liability under the TTCA, we must find that the TTCA applies. Because the TTCA does not apply to proprietary functions, we must find the function was governmental before we can apply the TTCA.

[2] Additionally, in his response to the plea to the jurisdiction, Montes pled that Susanto's accident gave the City prior notice. However, the police report shows Susanto's accident occurred at 1000 West 6th Street instead of at 600 West 6th Street. The City now points to the police report to claim it had no notice of any defect. Because Montes claims the City had

asserting that the accident was caused by the absence of a traffic or road sign, signal, or warning device. However, Montes' petition also plainly alleges the existence of a poorly lit traffic sign warning of a dead end. Therefore, assuming, as we must, that Montes' pleadings are true, the notice exception pertaining to the absence of a traffic or road sign, signal, or warning device does not apply.

Next, we consider whether Montes' pleadings were attempting to allege that the City put up the wrong type of warning device; i.e., a sign instead of a barricade. The law on this issue is clear; the decision of what type of warning device to use is discretionary, and therefore, the TTCA does not apply. See Tex.Civ.Prac. & Rem. Code Ann. §101.056 (Vernon 1997); *State v. Miguel*, 2 S.W.3d 249, 251 (Tex. 1999) (per curiam) (citing *Maxwell v. Texas Dep't of Transp.*, 880 S.W.2d 461, 464 (Tex.App.– Austin 1994, writ denied)). In *Miguel*, the plaintiff sued the Texas Department of Transportation because a work crew used barrels and signs to warn of a missing guardrail. 2 S.W.3d at 251. The *Miguel* court concluded that the decision to warn of the hazard rather than repair it, as well as the decision to use a particular warning device, were discretionary acts. *Id.* As a result, the court reversed the judgment and ordered that the respondents take nothing. See *id.* In this case, it is undisputed that there was a warning sign on the street. Montes argues the City should have used a barricade. However, the decision of what type of warning device to use is discretionary, and so, the TTCA does not apply. Because the TTCA does not apply, we do not reach the final question in determining if the TTCA waives immunity, i.e., whether Montes' claim is of the type that subjects the City to liability.

CONCLUSION

As the claimant, Montes had the burden of alleging

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notice that the intersection needed a barricade or warning lights, we assume, for purposes of the jurisdiction analysis, such notice existed.

facts showing that the trial court has subject matter jurisdiction. Because his pleading fails to make the requisite allegations, we cannot find the TTCA applies. Thus, we can only conclude the City did not waive its sovereign immunity, and the trial court did not err in finding it had no jurisdiction.[3] Accordingly, we affirm the trial court's dismissal of the case.

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[3] We recognize that in the suit filed by the estates of the other three occupants of the car, the First Court of Appeals has found the City is subject to liability under the TTCA. See *Reyes*, 4 S.W.3d at 462. The trial court in that case also granted a plea to the jurisdiction, but the pleadings in that case apparently did not mention a warning sign on West 6th Street because the First Court of Appeals held that the City had notice of the absence of a warning device. See *id.* Because Montes' pleadings in the case now before us mention the warning sign and we take these pleadings as true, jurisdiction is defeated by his pleading.

2000 WL 1562355 (Tex. App. - Houston [14th Dist.])

NOTICE: NOT DESIGNATED FOR PUBLICATION UNDER T.R.A.P. 47.7

Court of Appeals of Texas, Houston (14th Dist.)
Omar MONTES, Appellant,
v.
The CITY OF HOUSTON, Appellee.
No. 14-99-00174-CV.
October 19, 2000.

On Appeal from the 333rd District Court, Harris County, Texas, Trial Court Cause No. 98-05537.

Panel consists of Justices AMIDEI, ANDERSON, and FROST (J. AMIDEI dissenting).

SUPPLEMENTAL OPINION ON REHEARING

FROST, J.

In his motion for rehearing, appellant, Omar Montes, complains that this court misunderstands the purpose behind his pleading, and therefore, in footnote 3, improperly concludes that "jurisdiction is defeated by his pleading." Specifically, Montes states:

> If jurisdiction is defeated by the defense of sovereign immunity, that defense is created by the facts, not by Mr. Montes' pleading. Penalizing Mr. Montes and his counsel for pleading the truth, as opposed to what the Court notes is apparently what was not done in a companion case, stands every principle of law on its head. Truth and accuracy are punished, and a failure to disclose the truth is rewarded.
>
> It makes no sense for Omar Montes to not plead the

> truth, get an interlocutory ruling that sovereign immunity does not preclude the trial court from having jurisdiction, spend an inordinate amount of time, money, and emotional trauma to try the case to victory, and then lose the case because of the City's argument that a dead-end sign creates sovereign immunity... To imply in footnote 3 that Mr. Herzog [Montes' counsel] incorrectly pled Mr. Montes' claim, thereby resulting in a loss of the lawsuit, is unfair to Mr. Montes and his counsel and is unnecessary to the resolution of any issue in this case.

In a case challenging jurisdiction, the court is required to take as true all factual statements in the plaintiff's pleading. See *Continental Cas. Ins. Co. v. Functional Restoration Associates*, No. 98-0479, 2000 WL 351196 (Tex., April 6, 2000). Consequently, for jurisdictional purposes, a court views the plaintiff's pleading as the facts. Thus, the court's finding on jurisdiction is based on the facts in the pleading; it is not a comment on the drafter of the pleading but on the sufficiency of the jurisdictional facts.

4 S.W.3d 459

Court of Appeals of Texas,
Houston (1st Dist.).

Catalina Cortez REYES, Individually and as the Executor of the Estate of
Roberto Cortez, Deceased; Gregorio Leal and Margarita Leal, Individually and
as the Next Kin of Edward Leal, Deceased; and Refugio Rios Perez a/k/a Refugio
Rios and Guadalupe Rios, Individually and on the Behalf of the Estate of
Gilberto Rios, Deceased, Appellants,

v.

The CITY OF HOUSTON, Appellee.

No. 01-98-00062-CV.

Oct. 28, 1999.

Survivors of men killed in automobile accident brought wrongful death action against city. The 270th District Court, Harris County, Richard Hall, J., granted city's plea to jurisdiction. Survivors appealed. The Court of Appeals, Hedges, J., held that: (1) general statute granting city immunity for discretionary acts did not control over statute that waived immunity for liability for acts arising from absence, condition, or malfunction of traffic or warning devices, when absence, condition, or malfunction was not corrected after reasonable notice, and (2) trial court had subject matter jurisdiction over suit when survivors alleged that city had notice of danger of dead end street from prior accident and failed to barricade and properly warn about danger.

Reversed and remanded.

Keith C. Livesay, Pharr, Bill R. Gifford, Houston, Hector Eliseo Garcia, John Gregory Escamilla, McAllen, for appellant.

Anthony W. Hall, Jr., Laura Ann Coast, Houston, for appellee.

Panel consists of Justices MIRABAL, HEDGES, and SMITH. [FN*]

[FN*] The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

OPINION

ADELE HEDGES, Justice.

This is an appeal from the grant of a plea to the jurisdiction in favor of the City of Houston and the resulting dismissal for want of jurisdiction. We reverse and remand.

Facts

Three young men died in a car accident on July 13, 1996. Their car ran off the end of a dead-end road and hit a chain-link fence some distance from the road. Their survivors brought a wrongful death action [FN1] against the City of Houston under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem.Code Ann. §§ 101.001-.109 (Vernon 1997 & Supp.1999) [hereinafter "Act"]. The petition alleged that the City was negligent for its "failure to warn and barricade the dead end of Sixth (6th.) Street, where an excavation and road obstruction was located, for traffic traveling east-bound on Sixth (6th.) Street; especially during the hours of darkness." The petition further alleged "that the City had been notified of this dangerous condition from a similar type of accident at the same location during the month of June 1996; just prior to the accident made the basis of this lawsuit."

FN1. Catalina Cortez Reyes sued individually and as the executor of the estate of Roberto Cortez, deceased. Gregorio Leal and Margarita Leal sued individually and as next of kin of Edward Leal, deceased. Refugio Rios Perez a/k/a Refugio Rios and Guadalupe Rios intervened in the lawsuit individually and on behalf of the estate of Gilberto Rios, deceased. Reyes and the Leals have filed a separate appeal from the appeal brought by the Rios intervenors. Reyes, the Leals, and the Rioses will be collectively referred to as

appellants. The issue is not before us as to whether appellants are the proper parties to bring and benefit from a wrongful death action. *See* Tex. Civ. Prac. & Rem.Code Ann. §71.004 (Vernon 1997).

The City filed a plea to the jurisdiction, asserting that the trial court did not have jurisdiction based on governmental immunity. The trial court granted the plea to the jurisdiction and dismissed the cause.

Standard of Review

A plea to the jurisdiction contests the trial court's authority to determine the subject matter of the cause of action. *Texas Parks & Wildlife Dep't v. Garrett Place, Inc.*, 972 S.W.2d 140, 142 (Tex.App.-- Dallas 1998, no pet.). Subject matter jurisdiction is essential to a court's authority to decide a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex.1993). Subject matter jurisdiction is a question of law and cannot be waived. *Id.* at 446.

A plaintiff must allege facts affirmatively showing that the trial court had subject matter jurisdiction. *Id.* The trial court determines the issue solely by the allegations in the plaintiff's pleadings, and the allegations must be taken as true. *Id.* In our review, we construe the pleadings in favor of the pleader. *Id.*

Sovereign Immunity

The City of Houston is a governmental unit generally immune from tort liability, except where the legislature has specifically waived that immunity. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex.1995); *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 593 (Tex.App.--Austin 1991, writ denied). This suit was brought under the Act, which provides that a governmental unit is liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Act § 101.021(2).

Plea to the Jurisdiction

In issue 1(a), the Rioses contend that the City's plea to the jurisdiction was not the proper vehicle to assert immunity. *462 A person may appeal from an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Tex. Civ. Prac. & Rem.Code Ann. § 51.014(8) (Vernon 1997). [FN2]

FN2. Any dicta to the contrary stated in *Davis v. City of San Antonio,* 752 S.W.2d 518 (Tex.1988), has been superceded by this statute.

We overrule issue 1(a) by the Rioses.

Correction of Condition After Reasonable Notice Under Section 101.060(a)(2)

In issue 3(b) by the Rioses, and in issue 4 by Reyes and the Leals, appellants contend that the City is subject to liability under section 101.060(a)(2) because it did not correct the dangerous condition of the dead-end street, despite its knowledge of a prior car accident that occurred at the same location the month before the accident at issue. Specifically, appellants' petition alleged that: (1) the City was negligent for "failing to barricade and properly warn" about the dangers at the dead-end street; (2) "the City had been notified of this dangerous condition from a similar type of accident at the same location" that had occurred the month before; and (3) the City "put a barricade with reflective markings at the accident location only days after" the accident.

Under section 101.060(a)(2), immunity is not waived for a claim arising from the "absence, condition or malfunction of a traffic or road sign, signal, or warning device *unless* the absence, condition or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice." Act § 101.060(a)(2) (emphasis ours). In other words, immunity is waived if the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice.

Appellants contend that immunity is waived under

section 101.060(a)(2) in this case because the City's "absence of a barricade" was, under the statutory language, the "absence" of a "warning device" that was not corrected within a reasonable time after notice of the prior accident. In response, the City asserts that it is immune from liability because its acts were discretionary under section 101.056 of the Act.

This Court has previously held that immunity for discretionary acts under section 101.056 "does not apply to claims arising from the absence of a warning device if the government knew of the problem and failed to act within a reasonable time," as required by section 101.060. *Harris County v. Demny*, 886 S.W.2d 330, 336 n. 1 (Tex.App.--Houston [1st Dist.] 1994, writ denied); *see also Zambory v. City of Dallas*, 838 S.W.2d 580, 583 (Tex.App.--Dallas 1992, writ denied). Similarly, in this case, we disagree with the City's contention that section 101.056 controls over section 101.060(a)(2).

In our review, we construe the pleadings in favor of the pleader. *Texas Air Control Bd.*, 852 S.W.2d at 446. Appellants' petition described a prior accident at the same location the month before the accident at issue. Accordingly, for the limited purpose of the City's plea to the jurisdiction, we view appellants' pleadings as true regarding the City's notice of the prior accident and its failure to correct the condition within a reasonable time. Thus, the trial court erred in granting the City's plea to the jurisdiction because section 101.060(a)(2), in which immunity is waived, controls over section 101.056, in which discretionary acts are covered by immunity.

We sustain appellants' issue as to the claim under section 101.060(a)(2) and need not address the remaining issues presented. The City may still prevail on summary judgment on the issue of immunity if it establishes that there is no genuine issue of material fact regarding notice.

Conclusion

We reverse the judgment and remand the cause to the trial court.